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Division over Diversion: *Mitchell v. Helms*, 530 U.S. 793 (2000)

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Note*

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I. INTRODUCTION

The Supreme Court has repeatedly noted that application of the religion clauses of the First Amendment[1] is especially difficult in the area of government aid to religious schools.[2] In *Mitchell v. Helms*[3] the Court revisited the issue. The Court held that the state could lend educational and instructional materials to private sectarian schools and in the process overruled, in part, two of its earlier decisions,[4] *Meek v. Pittenger*[5] and *Wolman v. Walter*.[6]

While the Court was able to produce a judgment, it was unable to produce a majority opinion.[7] One of the key issues that produced dispute between the two groups of justices who voted to uphold the law was the role that the concepts of diversion and divertibility should play in Establishment Clause jurisprudence. Diversion occurs when government aid, secular on its face, is used for religious purposes.[8] Divertibility is the capability of aid, secular on its face, to be diverted to religious purposes.[9] Though many people assumed that both were important inquiries into the constitutionality of an aid program, a majority of justices in *Mitchell* rejected divertibility and the plurality rejected diversion. This Note traces the development of the concepts of diversion and divertibility.[10] It then provides an overview of the plurality and concurring opinions in *Mitchell*.[11] Finally, it analyzes the positions taken by the plurality and the concurrence in regards to diversion and divertibility to see how they comport with precedent and the principles underlying the Establishment Clause.[12]

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1. In its relevant part the First Amendment provides, "Congress shall make no law respecting an establishment of religion or prohibiting the Free Exercise thereof . . . ." U.S. CONST. amend. I.
2. *See, e.g.*, Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 382 (1985); Wolman v. Walter, 433 U.S. 229, 232 (1977); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
3. 530 U.S. 793 (2000).
4. *See Mitchell*, 530 U.S. at 835-36; *id.* at 837 (O'Connor, J., concurring).
5. 421 U.S. 349 (1975).
6. 433 U.S. 229 (1977).
7. Justice Thomas penned the plurality opinion and was joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy. Justice O'Connor, joined by Justice Breyer, concurred in the judgment. Justice Stevens and Justice Ginsburg joined in Justice Souter's dissent.
8. *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 21 (1993) (Blackmun, J., dissenting); Bowen v. Kendrick, 487 U.S. 589, 622-24 (1988) (O'Connor, J., concurring).
9. *See Zobrest*, 509 U.S. at 21 (1993) (Blackmun, J., dissenting).
10. *See infra* text accompanying notes 13-88.
11. *See infra* text accompanying notes 89-188.
12. *See infra* text accompanying notes 189-228.

II. BACKGROUND

A. The History of Diversion and Divertibility in Supreme Court Case Law

Both diversion and divertibility are difficult concepts to track in the case law. They are seldom explicitly mentioned, so one searching for them must turn to implied references. Furthermore, when they do appear, either implicitly or explicitly, they are often wrapped up with other concepts that the Court has used to trace the vague contours of Establishment Clause jurisprudence. This section of this Note traces the history of diversion and divertibility, highlighting those cases that show support for the concepts and those that tend to undercut them.

1. The Early Cases

Though the Court's earliest cases dealing with aid to private sectarian schools do not mention diversion or divertibility explicitly, there is implied support for both concepts. The earliest support comes from outside of the Establishment Clause context. *In Cochran v. Louisiana State Board of Education*,[13] the Court addressed whether a program that purchased books and gave them to school children (including those that attended sectarian schools) amounted to a taking of private property for a private use in violation of the Fourteenth Amendment.[14] In rejecting the claim that the aid served no public purpose, the Court largely adopted the reasoning of the Louisiana Supreme Court, which had noted that "'[a]mong these books, naturally, none is to be expected, adapted to religious instruction.'"[15] Such language suggests that the program's validity, in part, rested upon the fact the aid was not used for religious purposes.

Everson v. Board of Education,[16] the first case applying the Establishment Clause to a state program providing aid to parochial schools, also offers implied support for diversion and divertibility. There the Court considered a program that provided reimbursement for bus fares to the parents of parochial school students. After invoking strong language suggesting a strict separation between church and state,[17] the Court held that the legislation was a general public wel-

13. 281 U.S. 370 (1930).
14. *See id.* at 373-74.
15. *Id.* at 375 (quoting Borden v. Louisiana State Bd. of Educ., 123 So. 655, 660 (La. 1929)).
16. 330 U.S. 1 (1947).
17. The Court said:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force

fare program and that to deny the parochial school students the bus transportation would be to deny them ordinary government services because of their religious orientation.[18] The Court referred to the aid as being "separate" and "indisputably marked off from the religious function [of the school]."[19] One could see this language as suggesting that only aid incapable of diversion to religious purposes was allowable.

Though it seems to mitigate against divertibility, the next major school aid case following *Everson*, *Board of Education v. Allen*,[20] clearly offers support for diversion. In *Allen*, the court laid down a test saying "that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[21] The program at issue in *Allen* loaned secular textbooks without charge to privately and publicly educated students.[22] The Court reasoned that it was possible to keep the secular and the religious educational purposes of a private sectarian school separate and refused to accept the principle that "all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion."[23] The Court noted that nothing in the record suggested that the textbooks were used to teach religion, thus suggesting that had the claimants produced evidence to that effect, the constitutionality of the program would have been suspect.[24] Such reasoning implied that while the Court would consider whether actual diversion of materials to religious purposes had occurred, it would not invalidate a program based solely on the mere possibility of diversion.

> him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

Id. at 15-16.

18. *See id.* at 15-18.
19. *Id.* at 18.
20. 392 U.S. 236 (1968).
21. *Id.* at 243 (citing *Everson*, 374 U.S. at 222).
22. *See id.* at 239.
23. *Id.* at 248.
24. *See id.*

2. The 1970s

The 1970s marked a proliferation in the number of school-aid Establishment Clause cases and the cases from this decade offer the strongest support for the proposition that diversion and divertibility are important constitutional concepts. The paramount Establishment Clause case of the 1970s was *Lemon v. Kurtzman*,[25] in which the Court laid down the three-pronged test that has, in large part, framed Establishment Clauses jurisprudence ever since. Under the *Lemon* test, the law or provision in question must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion.[26] Within this three-pronged framework, diversion found a home as an effect prong concern. The Court spoke of and used divertibility as both an effect prong and as an entanglement prong concern.

a. Diversion and Divertibility as Effect Prong Concerns

Under the effect prong, diversion was always a concern for the Court in the 1970s. An establishment clause violation occurred whenever a school used funds from the government for religious purposes.[27] But waiting to see if diversion occurred was not always enough to ensure that no effect prong violation had occurred. Special problems arose when the aid's destination was a "pervasively sectarian school."[28] A pervasively sectarian school was one where "[t]he very purpose of [the] school [was] to provide an integrated secular and religious education"[29] and where "the teaching process [was], to a large extent, devoted to the inculcation of religious values and beliefs."[30] The Court's concern was that in such schools, aid would inevitably become intertwined with the school's religious mission.[31] When government aid went to such a school, it was unconstitutional, unless it could

25. 403 U.S. 602 (1971).

26. *See id.* at 612-13.

27. *See* Roemer v. Bd. of Pub. Works, 426 U.S. 736, 759-61 (1976); Hunt v. McNair, 413 U.S. 734, 744 (1973); *see also* Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973) (noting that "[i]n the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid").

28. *See* Wolman v. Walter, 433 U.S. 229, 249-51 (1977); *Roemer*, 426 U.S. at 755; Meek v. Pittenger, 421 U.S. 349, 366 (1975); *Hunt*, 413 U.S. at 734.

29. *Meek*, 421 U.S. at 366; *see also Lemon*, 403 U.S. at 617-19; Tilton v. Richardson, 403 U.S. 672, 685-86 (1971).

30. *Meek*, 421 U.S. 349, 366; *see also Lemon*, 403 U.S. at 617-19; *Tilton*, 403 U.S. 672, 685-86.

31. *See Wolman*, 433 U.S. at 250; *Meek*, 421 U.S. at 366.

be counted on to be "purely secular,"[32] or in other words, non-divertible.

When the Court used diversion and divertibility in this manner, aid to religious elementary and secondary schools had a difficult time passing the effect prong because the Court almost always classified the schools as pervasively sectarian. The two most illustrative cases are *Meek v. Pittenger*[33] and *Wolman v. Walter*,[34] the two cases that *Mitchell* overrules. In *Meek* and *Wolman*, the Court confronted a myriad of school aid programs. Under the effect prong, the Court struck down aid in the form of instructional materials and equipment[35] regardless of whether the state gave it directly to the schools[36] or to the children.[37] The Court reasoned that given their pervasively sectarian nature, "[s]ubstantial aid to the educational function of [the] schools . . . necessarily result[ed] in aid to the sectarian school enterprise as a whole," including its religious function.[38]

In *Wolman*, the Court, using the effect prong, also struck down a program that allowed local school districts to contract with commercial transportation companies to provide private schools with transportation for field trips.[39] The Court saw such trips as an "integral part of the educational experience" and reasoned that because the teachers who led the trips were employees of the sectarian schools there existed "an unacceptable risk of fostering of religion."[40] Thus, it was declared "an impermissible direct aid to sectarian education."[41]

The Court did not strike down every program it confronted that gave aid to pervasively sectarian schools. It continued to allow programs like that in *Allen* that loaned textbooks to school children who attended private schools.[42] The Court also upheld programs providing

32. *Roemer*, 426 U.S. at 749.
33. 421 U.S. 349 (1975).
34. 433 U.S. 229 (1977).
35. *See Meek*, 421 U.S. at 362-66; *Wolman*, 433 U.S. at 248-51. In *Wolman*, the program explicitly called for aid that was incapable of diversion, but the Court was unconvinced by this distinction. *See Wolman*, 433 U.S. at 248.
36. *See Meek*, 421 U.S. at 362-63. The Court expressed concern that the teachers at the religious schools would draft the tests in such a manner that the tests would inculcate students in the religious precepts of the sponsoring church. *See id.* at 480. The Court later struck down an attempt to make a payment to reimburse those schools that had conducted the testing prior to *Levitt*. *See* New York v. Cathedral Academy, 434 U.S. 125 (1977).
37. *See Wolman*, 433 U.S. at 250 ("Despite the technical change in legal bailee, the program in substance is the same as before: The equipment is substantially the same; it will receive the same use by the students; and it may still be stored and distributed on the nonpublic school premises.").
38. *See Meek*, 421 U.S. at 366.
39. *See Wolman*, 433 U.S. at 252-55.
40. *Id.* at 254.
41. *Id.*
42. *See Wolman*, 433 U.S. at 236-38; *Meek*, 421 U.S. at 359-62.

speech and hearing diagnostic services,[43] testing services,[44] and therapeutic, guidance and remedial services provided to nonpublic students away from nonpublic schools.[45] The critical aspect of these types of aid that made them permissible was (apparently) the fact that the Court saw them as having a set content that the school could not divert to sectarian uses.[46]

In contrast to elementary and secondary religiously affiliated schools, aid generally passed the effect prong when it went to universities and colleges.[47] The Court did not consider these institutes of higher learning to be pervasively sectarian because they were only loosely governed by their associated religions and were more open to intellectual freedom.[48] The Court also noted that unlike impressionable elementary and secondary students "college students are less impressionable and less susceptible to religious indoctrination."[49] Thus, the Court deemed aid to universities and colleges unconstitutional only when funds were diverted to a "specifically religious activity."[50]

b. Divertibility as an Entanglement Prong Concern

Divertibility was not analyzed solely as an effect prong concern during the 1970s. The Court also used it as a tool to analyze aid programs under the entanglement prong.[51] When analyzed as an entanglement prong concern, divertibility was a direct product of diversion. Because the school was not allowed to divert the aid to religious purposes, the government was required to oversee the use of the aid. The Court feared that the required oversight by the government would result in an unacceptable level of "comprehensive, discriminating, and continuing state surveillance [creating] a relationship pregnant with dangers of excessive government direction of church schools and hence of churches."[52] One sure way to avoid the entanglement problem was to allow only that aid that the school could not divert to religious uses.

43. *See Wolman*, 433 U.S. at 241-44.
44. *See id.* at 241-42.
45. *See id.* at 245-48.
46. *See id.* at 251 n.18.
47. *See, e.g.*, Roemer v. Bd. of Pub. Works, 426 U.S. at 755-61 (1976); Hunt v. McNair, 413 U.S. 734, 742-45 (1973).
48. *See Roemer*, 426 U.S. at 755-58; *Hunt*, 413 U.S. at 743-44; Tilton v. Richardson, 403 U.S. 672, 686 (1971).
49. *Tilton*, 403 U.S. at 686.
50. *Roemer*, 426 U.S. at 759; *Hunt*, 413 U.S. at 743.
51. *See* Wolman v. Walter, 433 U.S. 229, 255 (1977); *Roemer*, 426 U.S. at 761-65; Meek v. Pittenger, 421 U.S. 349, 367-72 (1975); *Hunt*, 413 U.S. at 745-49 (1973); *Tilton*, 403 U.S. at 684-887; Lemon v. Kurtzman, 403 U.S. 602, 614-22 (1971); Pub. Funds for Pub. Sch. v. Marburger, 358 F. Supp. 29 (D.N.J. 1979), *aff'd*, 417 U.S. 961 (1974).
52. *Lemon*, 403 U.S. at 619-20; *see also* Aguilar v. Felton, 473 U.S. 402, 413 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997) ("The pervasive monitoring

Divertibility under the entanglement prong was not such a problem when the aid was going to a school where the risk of diversion was lower, like universities and colleges,[53] but when the school was pervasively sectarian, the risk was unacceptable.[54] Thus, the Court struck down several aid programs to such schools because it feared the resulting entanglement. These programs included aid to private schools to reimburse sectarian teachers for the secular subjects they taught,[55] and a program that sent public school teachers and professional staff workers to private schools for remedial and accelerated instruction, guidance counseling and testing, and speech and hearing services.[56] The Court also affirmed without opinion a lower court decision that had held that programs providing instructional aid and materials violated the entanglement prong.[57] The lower court reasoned that though the aid was "inherently neutral" it was capable of varied uses including "facility in the teaching of religious studies."[58] The lower court then said: "[i]t is this necessity . . . to enforce the limitations on the use of the funds which will forever demand a State involvement and a continuing and intolerable Government presence in the affairs of a church."[59]

3. The 1980s and the 1990s: Support Wanes

By the end of the 1970s, both divertibility and diversion looked like they had a place in Establishment Clause case law and to some extent

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by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement. Agents of the city must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matter . . . .").

53. *See, e.g., Roemer*, 426 U.S. at 761-65; *Hunt*, 413 U.S. at 745-49; *Tilton*, 403 U.S. at 684-887.

54. *See, e.g., Aguilar*, 473 U.S. at 408-14; *Meek*, 421 U.S. at 367-72; *Lemon*, 403 U.S. at 614-22; *Marburger*, 358 F. Supp. 29 *aff'd*, 417 U.S. 961; *see also Wolman*, 433 U.S. at 255 (striking down aid to provide commercial transportation for private schools for field trips because it violated both the effect and the establishment prongs).

55. *See Lemon*, 403 U.S. 602.

56. *Meek*, 421 U.S. at 367-72; *see also Aguilar*, 473 U.S. 402 (striking down program that repaid public school teachers who provided remedial instruction and guidance services to parochial school students on the premises of parochial schools, because it created the potential for excessive entanglement).

57. *See* Marburger v. Pub. Funds for Pub. Sch., 417 U.S. 961 (1974), *aff'g* 358 F. Supp. 29 (1973). In *Meek*, the Court noted that the result in upholding *Marburger* was entitled to precedential weight. *See id.* at 349, 366 n.16. "The [district] court [in *Marburger*] also held . . . that excessive entanglement of church and state would result from attempts to police use of material and equipment that were readily divertible to religious uses. This Court's affirmance of the result in *Marburger* was a decision on the merits, entitled to precedential weight." *Id.* (citations omitted).

58. *Marburger*, 358 F. Supp. at 38-39.

59. *Id.* at 39.

they continued to play a role into the 1980s.[60] But several decisions in the 1980s and 1990s called into question the continuing validity of the two concepts.

Committee for Public Education and Religious Liberty v. Regan[61] was the first case that some see as dealing a blow to diversion and divertibility.[62] In *Regan*, the Court upheld a program that provided financial reimbursement to schools for testing and reporting services mandated by state law.[63] The Court rejected the argument that any aid to sectarian schools is impermissible because their religious teaching was so pervasively intermixed with each and every one of the school's activities.[64] However, it is not at all clear whether or not this undercuts diversion and divertibility. The Court was careful to note that "the outcome would likely be different were there no effective means for insuring that the cash reimbursements would cover only secular services."[65] Such language suggested that had the Court seen diversion as a real threat, it would have struck down the aid.

A second case that presents a more powerful argument that the importance of diversion and divertibility declined in the 1980's is *Mueller v. Allen*.[66] In *Mueller*, the Court upheld a tax deduction for tuition to public and private schools as well as a tax deduction for educational materials used at private schools.[67] The Court did not discuss whether or not the deductions had to correspond only to secular purposes, even though the tax deductions were for items that could have, as a dissenting Justice Marshall pointed out, "plainly [been] used to inculcate religious values and beliefs."[68]

60. *See* Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), *overruled in part by* Agostini v. Felton, 521 U.S. 203 (1997); Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997). *Aguilar* struck down a program in which the state repaid public school employees who provided remedial instruction and guidance counseling on public school grounds. *See* 473 U.S. 402. *Ball* stuck down a program similar to that in *Aguilar* as well as a funding for a community education program that taught several different kinds of classes after the school day was over. *See* 473 U.S. 373. The community education program, in part, made use of both sectarian schools and sectarian school teachers. *See id.*

In *Bowen v. Kendrick*, 487 U.S. 589 (1988), the Court dealt with a program that provided aid to several groups including religious groups so that the they could help curb unwanted teenage pregnancies. *See id.* at 593-97. The Court remanded the case so that the district court could determine whether the groups were pervasively sectarian and whether the groups had used any of the aid to fund specifically religious activities. *See id.* at 621.

61. 444 U.S. 646 (1980).
62. *See, e.g.*, Walker v. S.F. Unified Sch. Dist., 46 F.3d 1449, 1465-69 (9th Cir. 1995) (arguing that *Regan* undercut *Meek* and *Wolman*).
63. *See* 444 U.S. at 651-52.
64. *See id.* at 661.
65. *Id.* at 659.
66. 463 U.S. 388 (1983).
67. *See id.*
68. *Id.* at 414 (Marshall, J., dissenting).

Witters v. Washington Department of Services for the Blind[69] also seemed to ignore diversion and divertibility concerns. In this case, the petitioner was a blind person studying to become a pastor at a Christian college.[70] He wanted to use money from a state program that provided aid for vocational development to the handicapped to help offset his tuition costs.[71] Thus, the nature of the proposed use of the aid meant that it would almost certainly be used for religious purposes.[72] The Court, unanimous in judgment, but sharply split by differences in reasoning, ruled that using the money in such a manner would not violate the Establishment Clause.[73] No Justice mentioned diversion or divertibility.[74]

In *Zobrest v. Catalina Foothills School District*,[75] a deaf student attending a Roman Catholic school argued that the Establishment Clause would not be violated if the local school district provided him with a sign-language interpreter under the Individuals with Disabilities Education Act.[76] The Court accepted the student's argument and did not attempt to argue that the aid was only appropriate so long as it was used only for secular purposes. Instead, it said, "[t]he sign-language interpreter will neither add to nor subtract from [the pervasively sectarian environment]."[77] The Court's language suggested that the interpreter was free to communicate not only secular, but also religious messages.

4. Agostini v. Felton

Any discussion of Establishment Clause jurisprudence, whatever the specific topic, would not be complete without mentioning *Agostini v. Felton*,[78] the last major school aid decision prior to *Mitchell*. In *Agostini*, the Court re-evaluated its decisions in *Aguilar v. Felton*[79] and *School District of Grand Rapids v. Ball*.[80] *Agostini* entirely overruled *Aguilar* and overruled *Ball* in part.[81]

Agostini is important in the overall Establishment Clause scheme because it reworked the *Lemon* test. Instead of viewing excessive en-

69. 474 U.S. 481 (1986).
70. *See id.* at 483-85.
71. *See id.*
72. *See* Mitchell v. Helms, 530 U.S. 793, 821 (2000).
73. *See Witters*, 474 U.S. 481.
74. *See id.*
75. 509 U.S. 1 (1993).
76. *See id.* at 3.
77. *Id.* at 13.
78. 521 U.S. 203 (1997).
79. 473 U.S. 402 (1985).
80. 473 U.S. 373 (1985).
81. *See Agostini*, 521 U.S. at 236.

tanglement as a separate prong, *Agostini* placed it into the effect prong.[82] The Court reasoned as follows:

> [T]he factors we use to assess whether an entanglement is "excessive" are similar to the factors we use to examine "effect." That is, to assess entanglement, we have looked to the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between government and religious authority.[83]

Thus, the test was now two pronged: (1) whether the legislation had a secular purpose; and (2) whether the primary effect of the legislation was to advance or inhibit religion. The Court also clarified what criteria were to be used to evaluate the effect prong, saying that an effect prong violation does not occur so long as the aid in question "does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."[84]

The *Agostini* decision also created potential issues surrounding the applicability of divertibility. Divertibility, in a large part, rested upon the presumption that pervasively sectarian schools would inevitably divert the aid they received to religious purposes. So in *Aguilar* and *Ball*, for example, the Court assumed that the public school teachers would inevitably inculcate religion because of the pervasively sectarian atmosphere in which they taught.[85] While the *Agostini* Court continued to require that the public school teachers not inculcate religion,[86] it rejected the irrebuttable presumption that they would.[87] The concurrence in *Mitchell* built upon this aspect of *Agostini* in its contention that diversion, but not divertibility, was a proper inquiry when deciding an aid program's constitutionality.[88]

B. *Mitchell v. Helms*

1. *Factual Background*

In *Mitchell*, the Court examined the constitutionality of Chapter 2 of the Education and Consolidation Act of 1981[89] as it was applied in Jefferson County, Louisiana.[90] Chapter 2 is designed to funnel fed-

82. *See id.* at 232.
83. *Id.*
84. *Id.* at 234.
85. *See Aguilar*, 473 U.S. at 410-414; *Ball*, 473 U.S. 373 at 385.
86. *See Agostini*, 521 U.S. at 226-27.
87. *See id.*
88. *See* Mitchell v. Helms, 530 U.S. 793, 855-862 (2000) (O'Connor, J., concurring).
89. 20 U.S.C. §§ 7301-7373 (2000). "Chapter 2 is now technically Subchapter VI of Chapter 70 of 20 U.S.C., where it was codified by the Improving America's School Act of 1994, Pub.L. 103-382, 108 Stat. 3707." *Mitchell*, 530 U.S. at 801 n.1. Because all courts involved referred to the program as Chapter 2, this Note will as well.
90. *See Mitchell*, 530 U.S. at 801. In the lower courts, the litigation also dealt with the constitutionality of several other programs. The Fifth Circuit upheld a Louisiana program that provided aid for special education programs in private

eral funding into local school districts in order to develop programs that assist children in secondary and primary schools.[91] Money first flows to state educational agencies (SEA's) that in turn provide the money to local school agencies (LEA's) to implement the programs.[92] The LEA's and SEA's are required to offer assistance to both public and nonprofit private schools within their respective districts.[93] The amount of aid to be given to each school is determined by the number of enrolled students.[94] The amount of aid given to the students of private schools is generally supposed to be equal to the amount of aid given to students of public schools.[95] The aid provided by the LEA's and SEA's is to be given in such a manner as to supplement and not supplant the funds from non-public sources.[96]

Under Chapter 2, when a private school wants aid it sends an application to the LEA describing what kind of aid it wants and how it will use the aid.[97] The requested services, materials, and equipment must be secular, neutral, and nonidealogical.[98] If the LEA approves the private school's aid request, the LEA uses the money allocated to the particular school to purchase the requested materials which in turn are lent to the requesting school.[99]

In Jefferson Parish, forty-six private schools received the aid. Thirty-four of these schools were Roman Catholic, seven were otherwise religiously affiliated, and five had no religious affiliation.[100] According to the Court, the schools within Jefferson Parish generally used the money to purchase nonrecurring expenses.[101] That is, materials such as "library books, computers and computer software, and also slide and movie projectors, overhead projectors, televisions sets, tape recorders, VCR's, projection screens, laboratory equipment, maps, globes, filmstrips, slides, and cassette recordings."[102]

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schools, *see* Helms v. Picard, 151 F.3d 347, 350-65 (5th Cir. 1998), and a Louisiana program that provided funding for busing to nonpublic school students, *see id.* at 374-77. The Fifth Circuit also struck down the Louisiana equivalent of Chapter 2. *See id.* at 367-74.

91. *See Mitchell*, 530 U.S. at 802.
92. *See id.*
93. *See id.* (citing 20 U.S.C. §§ 7312(a), 7372(a)(1) (2000)).
94. *See id.* (citing § 7372(a)).
95. *See id.* (citing § 7372(b)).
96. *See id.* (citing § 7371(b)).
97. *See id.* at 803.
98. *See id.* at 802 (citing § 7372(a)(1)).
99. *See id.* at 803.
100. *See id.*
101. *See id.* The Court noted that in fiscal year 1986-1987 44% of the money was allocated for library and media services and 48% was allocated for instructional materials. *See id.*
102. *Id.*

2. Procedural Background

The Court characterized the litigation that led to the *Mitchell* decision as tortuous.[103] The plaintiffs filed suit in 1985 alleging that Chapter 2, as applied in Jefferson Parish, violated the Establishment Clause.[104] In a 1990 motion for summary judgment, the district court, relying on the second effect of the *Lemon* test as that prong was applied in earlier cases, struck down Chapter 2 as it was applied in Jefferson Parish.[105] The district court concluded that, because the materials that were provided to the Catholic schools in the Parish constituted direct aid to pervasively sectarian schools, Chapter 2 had the primary effect of advancing religion.[106] Thus, all of the permanently sectarian schools in Jefferson Parish were excluded from receiving aid.[107]

Two years later, the judge that had ruled that Chapter 2's application in Jefferson Parish was unconstitutional retired, and a different judge received the case.[108] Before the new judge had an opportunity to issue a new ruling on Chapter 2, a Ninth Circuit panel addressed a similar question concerning Chapter 2 in *Walker v. San Francisco Unified School District*.[109] The Ninth Circuit panel reasoned that cases subsequent to *Wolman* had robbed the distinction that case had drawn between instructional equipment and material and textbooks of its "constitutional significance."[110] The *Walker* court then said that the applicable test had two parts: "(1) whether the Chapter 2 benefit at issue is a general welfare benefit neutrally available to a broad class of people without reference to religion, . . . and (2) whether the benefit, even though generally available, created a symbolic union of church and state."[111] The *Walker* court then held that the Chapter 2 aid passed the test and was constitutional.[112]

In 1997, the judge that had been assigned to the *Mitchell* litigation five years earlier revisited the case. Pointing to *Zobrest*, *Rosenburger*

103. *See id.* at 804. The named defendant in the case is the State Superintendent of Instruction. The litigation lasted so long that the name was changed several times to correspond to each change in Superintendent. *See* Charles J. Russo and Ralph D. Mawdsely, Comment, *Giving with One Hand, Taking with the Other: State Aid to Religiously Affiliated Nonpublic Schools*, 140 ED. LAW REP. 807, 822 n.9 (2000).

104. *See Mitchell*, 530 U.S. at 803-04.

105. *See* Helms v. Cody, No. CIV.A.85-5533, 1990 WL 36124, at *7 (E.D. La. Mar. 27, 1990).

106. *See id.* Though apparently not decisive, the district court also expressed concerns about the oversight of the program causing entanglement problems. *See id.*

107. *See id.* at *7-8.

108. *See id.*

109. 46 F.3d 1449 (9th Cir. 1995).

110. *Id.* at 1466.

111. *Id.* at 1467.

112. *See id.* at 1467-1469.

v. Rector,[113] and *Walker*, the judge concluded that intervening case law mandated reversal.[114] The judge expressed concerns about diversion but found that the controls in place were sufficient to prevent Chapter 2 benefits from being diverted to religious instruction.[115] The judge also found that the controls designed to prevent aid from being diverted did not create an excessive entanglement.[116] Thus, the district court reversed the earlier decision and held Chapter 2 constitutional.[117]

In 1998, in *Helms v. Picard*,[118] a Fifth Circuit Panel reversed the district court's holding and found that Chapter 2, as applied in Jefferson Parish, violated the Establishment Clause.[119] Though it admitted that the Supreme Court's pronouncements about school aid were confusing, the panel felt that the Ninth Circuit panel had overstepped its bounds in dismissing *Meek* and *Wolman* and refused to follow in *Walker*'s footsteps.[120] Instead, the Fifth Circuit chose to follow *Meek* and *Wolman*. Precedent, in the panel's view, had not overruled *Wolman*, as the Ninth Circuit had suggested, but had reaffirmed *Wolman's* holding that *Meek* prohibited only "a particular kind of aid to parochial schools—the loan of instructional materials."[121] Thus, viewing itself bound by precedent, the Fifth Circuit panel held that Jefferson Parish's application of Chapter 2 had the primary effect of advancing religion and left it to the Supreme Court to determine if *Meek* and *Wolman* required reversal.

3. *The Plurality Opinion*

a. *Scope of the Opinion and the Test To Be Applied*

Justice Thomas began his plurality opinion by stating that the *Lemon* test, as modified in *Agostini*, would guide the Court's deci-

113. 515 U.S. 819 (1995) (holding that the Establishment Clause does not require a public university to exclude a student-run religious publication from financial assistance available to other student-run publications).

114. *See* Helms v. Cody, No. CIV.A.85-5533, 1997 WL 35283, at *7-16 (E.D. La. Jan. 28, 1997).

115. *See id.* at *15.

116. *See id.* at *16.

117. *See id.*

118. 151 F.3d 347 (5th Cir. 1998).

119. *See id.* at 374.

120. *See id.* at 369-73. The Fifth Circuit said as follows:

> We could take out our judicial divining rod and try to predict, on the basis of what has been said since *Meek* and *Wolman*, what the present Court would do if called upon to weigh the constitutionality of Chapter 2. But such a course would, we think, take us beyond our role as a Circuit Court of Appeals, bound to follow the dictates of the Supreme Court.

Id. at 371.

121. *Id.* at 373.

sion.[122] The plurality noted that in *Agostini* the Court had modified the three-pronged *Lemon* Test. The inquiry for the plurality, then, was whether Chapter 2 as applied in Jefferson Parish had: (1) a secular purpose and (2) a primary effect that neither advanced nor inhibited religion.[123] However, because neither the respondent's nor the Fifth Circuit had questioned the district court's ruling that Chapter 2 had a secular purpose, the plurality did not consider that issue.[124] Thus, the focus was solely on the effect prong.

According to the plurality, in order to pass the effect prong, the law "[must] not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."[125] Because neither the Fifth Circuit nor the respondents had questioned the district court's ruling that Jefferson Parish's application of Chapter 2 did not cause an excessive entanglement between government and religion, that aspect of the effect prong was not analyzed.[126] Thus, the constitutionality of Jefferson Parish's application of Chapter 2 hinged on whether it resulted in governmental indoctrination and whether it defined its recipients by reference to religion.[127]

b. Government Indoctrination

According to the plurality, "the question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action."[128] The plurality found that the more recent Establishment Clause precedent had made neutrality the guiding principle in determining whether a program that aids religious institutions leads to governmental indoctrination.[129] "If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government."[130] This neutrality is assured when the aid that goes to religious institutions "does so 'only as a result of the genuinely independent and private choices of individuals.'"[131] Neutrality alone though was not the plurality's sole test

122. *See* Mitchell v. Helms, 530 U.S. 793, 808 (2000).
123. *See id.*
124. *See id.*
125. *Id.* (quoting Agostini v. Felton, 521 U.S. 203, 234 (1997)).
126. *See id.*
127. *See id.*
128. *Id.* at 809.
129. *See id.* at 809-14. The plurality relied specifically on *Agostini*, *Zobrest*, *Witters* and *Mueller* to reach their conclusion that neutrality was the principle which guides the inquiry into government indoctrination. *See id.*
130. *Id.* at 809.
131. *Id.* at 810 (quoting *Agostini*, 521 U.S. at 226).

for government indoctrination. A challenger to the constitutionality of government aid could also show government indoctrination when the aid provided had content unsuitable for public schools.[132]

Applying these principles of neutrality, private choice, and proper content, the plurality found that Jefferson Parish's application of Chapter 2 did not lead to government indoctrination.[133] The plurality noted that the program made aid available to "a broad array of schools without regard to their religious affiliations or lack thereof."[134] Because, the plurality reasoned, aid in Jefferson Parish was tied to the number of students enrolled in each school, the allocation represented the private decisionmaking of the students and their parents.[135] The plurality also noted that that the aid provided had, for the most part, consisted of proper content. The plurality did note that before the start of the litigation the LEA had lent some books with improper content to some private schools.[136] The plurality found that the de minimis nature of these violations[137] and the success of the monitoring system in remedying the error negated the violations as grounds for declaring the aid unconstitutional.[138]

c. Definition of Recipients by Religion

For the plurality, the focus in determining whether or not a program defines its recipients by religion was "whether the criteria for allocating the aid 'creat[es] a financial incentive to undertake religious indoctrination'" on the part of the aid recipient.[139] Once again the guiding principle was neutrality: "'[T]he incentive to undertake religious indoctrination] is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis.'"[140] The plurality also saw private choice as playing a key part in this portion of the effect prong analysis: "For to say that a program does not create an incentive to

132. *See id.* at 822. The plurality mentioned this part of the test for government indoctrination while rejecting the respondent's claim that divertibility was a factor in Establishment Clause analysis. *See id.* at 820-25. The plurality's analysis of Chapter 2 as applied in Jefferson Parish makes it clear that the improper content test is a factor in determining if the program leads to government indoctrination. *See id.* at 831-32 ("Respondents . . . offer no evidence that religious schools have received software from the government that has an impermissible content.").

133. *See id.* at 831.

134. *Id.* at 834.

135. *See id.* at 834.

136. *See id.*

137. The violations occurred over three school years and "amounted to less than one percent of the total allocation over all those years." *Id.* at 835.

138. *See id.* at 834-35.

139. *Id.* at 813 (quoting Agostini v. Felton, 521 U.S. 203, 231 (1997)).

140. *Id.* (quoting *Agostini*, 521 U.S. at 231).

choose religious schools is to say that the private choice is truly 'independent.'"[141] The plurality made it clear that aid programs do not define their recipients by religion just because they reduce costs at private religious school and thereby make a private education less expensive.[142]

The plurality found that the application of Chapter 2 in Jefferson Parish did not create an incentive for parents and students to undertake religious indoctrination.[143] This was true because Chapter 2 required aid to be distributed to public and private schools "based on the per capita number of students in each school."[144] In other words, Jefferson Parish distributed aid in such a manner that every dollar spent on a private school student was equal to the amount spent on the public school student,[145] and, therefore, "create[d] no improper incentive."[146]

d. Divertibility (and other considerations) in the Plurality Opinion

The plurality specifically rejected four other arguments for declaring Chapter 2 unconstitutional: first, that the aid was unconstitutional because it provided direct, as opposed to incidental aid, to private, religiously affiliated schools;[147] second, that the aid was unconstitutional because the recipients were pervasively sectarian;[148] third, that the aid posed the risk of creating political divisiveness along religious lines;[149] and fourth, that the aid was capable of being diverted to religious purposes.[150] Only three of these arguments will be discussed at any length in this Note. Of course, because the final argument is the main topic of this note, it will be discussed at length. Also, the plurality's discussion of "pervasively sectarian" and "direct aid" warrants some mention, because both arguments tie into diversion and divertibility. Political divisiveness has no bearing on diversion or divertibility and is therefore outside of the scope of this Note.

After defining diversion as the use of government aid to further religion,[151] the plurality rejected both it and divertibility as relevant

141. *Id.* at 814 (quoting Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986)).
142. *See Mitchell*, 530 U.S. at 814.
143. *See id.* at 829-830.
144. *Id.* (quoting Walker v. S.F. Unified Sch. Dist., 46 F.3d 1449, 1464 (9th Cir. 1995)).
145. *See Mitchell*, 530 U.S. at 829-30.
146. *Id.* at 830.
147. *See id.* at 815-20.
148. *See id.* at 826-29.
149. *See id.* at 825-26.
150. *See id.* at 820-25.
151. *See id.* at 821 (citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 21 (1993) (Blackmun, J., dissenting)).

Establishment Clause inquiries. Instead, the plurality said that aid is constitutional "[s]o long as the governmental aid is not itself 'unsuitable for use in the public schools because of religious content,' and eligibility for aid is determined in a constitutionally permissible manner."[152] Though the plurality did not specifically elaborate on what it meant by eligibility for aid being determined in a constitutionally permissible manner, it presumably was referring to the same principles of neutrality and free choice it used to discuss the "primary effect" question.[153] Thus, the key question for the plurality was not whether the aid was capable of diversion, or even if it had been diverted, but rather "whether the aid itself ha[d] an impermissible content."[154] To guide the inquiry the plurality said that "[w]here the aid would be suitable for use in a public school, it is also suitable for use in any private school."[155]

The plurality, therefore, rejected both diversion and divertibility. For the plurality, there was no inquiry into what the private school did with the aid that it received. So long as the aid given had a secular purpose, was provided in a constitutionally permissible way, and had a content proper for a public school, the aid was constitutional.

The plurality based its decision to reject diversion on both precedent and what it saw as the unworkable nature of the doctrine. The plurality viewed recent precedent as having rejected diversion[156] and did not see how, even if it was a proper inquiry, adequate safeguards could be designed to prevent it.[157] The plurality also argued that it was not possible to attribute any indoctrination to the government when the private school diverted aid to religious purposes.[158]

As for divertibility, the plurality argued that the concept failed to explain the difference between aid that the Court had found permissible and aid that it had found impermissible.[159] The Court argued that all aid was divertible in at least some sense, noting that "any aid, with or without content, is 'divertible' in the sense that it allows schools to 'divert' resources."[160] Therefore, the plurality concluded that divertibility could not bear any relation to "any realistic concern for preventing an 'establishment of religion.'"[161]

152. *Id.* at 820 (quoting Bd. of Educ. v. Allen, 392 U.S. 236, 245 (1968)).
153. *See Mitchell*, 530 U.S. at 829-35 (analyzing Chapter 2 under the principles the plurality announced).
154. *Id.* at 822.
155. *Id.*
156. *See id.* at 820-25.
157. *See id.* at 832-34. The plurality illustrated this by pointing to what it saw as inadequate standards used by Jefferson Parish. *See id.*
158. *See id.* at 824.
159. *See id.* at 820-24.
160. *Id.* at 824.
161. *Id.*

Because Justice O'Connor, unlike the plurality, argued that diversion is a relevant inquiry when the aid is provided in a direct and nonincidental manner, it is important to see how the plurality dismissed the respondent's argument that direct, nonincidental aid to religious schools is always impermissible.[162] The plurality noted that in the past the Court had used the distinction "to prevent 'subsidization' of religion."[163] The plurality contended that the Court's more recent decisions had addressed the subsidization fear through the principle of private choice and thus, "[i]f aid to schools, even 'direct aid,' [was] neutrally available and, before reaching or benefiting any religious school[s,] first passe[d] through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'"[164] Thus, the per capita method of allocation used by Chapter 2 was not constitutionally infirm because private decision making ultimately controlled the scheme.[165] It did not matter that the Chapter 2 aid went directly to the schools so long as it was the "students and their parents—not the government—who, through their choice of school, determine[d] who received[d] Chapter 2 funds."[166]

The plurality also rejected the pervasively sectarian nature of the aid recipient as a classification that still had significance when inquiring into an aid program's constitutionality.[167] This is significant for divertibility, because the Court's use of the concept in its earlier precedents was largely tied to a school's pervasively sectarian nature.[168] The plurality discussed four reasons for doing away with the distinction. First, the plurality noted that the use of the distinction by the Court was in "sharp decline."[169] Second, the plurality felt that "the religious nature of a[n aid] recipient should not matter . . . so long as the recipient adequately furthers the government's secular purpose."[170] Third, the plurality noted that in other areas, especially

162. The plurality understood the direct/incidental distinction as meaning the aid flowed directly to the school from the government, as opposed to the aid going first to individuals who then transferred it to private schools. See *id.* at 815-20. One commentator argues that the direct/incidental distinction actually is not, as the plurality suggests, concerned with the path the aid takes but with the "substantive impact of the aid on the recipient school's educational functions." Steven K. Green, *Private School Vouchers and the Confusion over "Direct" Aid*, 10 GEO. MASON U. CIV. RTS. L.J. 47, 81 (1999-2000).

163. *Mitchell*, 530 U.S. at 816 (quoting Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 394 (1985)).

164. *Mitchell*, 530 U.S. at 816 (quoting Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 489 (1986)).

165. *See id.* at 829-31.

166. *Id.* at 830.

167. *See id.* at 826-29.

168. *See supra* text accompanying notes 28-41, 54.

169. *Mitchell*, 530 U.S. at 826.

170. *Id.* at 827-28.

cases dealing with the Free Exercise Clause, the Court had expressed a concern with "trolling through a person's or institution's beliefs," and in order to determine if a school was pervasively sectarian, the Court had to make just such an offensive inquiry.[171] Fourth, the plurality saw the entire concept of pervasively sectarian as being tied to an anti-Roman Catholic mentality.[172]

4. The Concurrence

Though both the concurrence and the plurality agreed that Chapter 2 as applied in Jefferson County was constitutional and that thus *Meek* and *Wolman* required reversal, there was a sharp split in reasoning, especially concerning the use of actual diversion as a test for the constitutionality of a program. In setting up the basic framework for her analysis, Justice O'Connor agreed with the plurality that *Agostini* controlled the inquiry into the constitutionality of Chapter 2. Thus, the key question for Justice O'Connor, as it was for the plurality, was whether the aid had the primary effect of advancing or inhibiting religion.[173] Justice O'Connor also agreed that to determine whether the aid had the primary effect of advancing or inhibiting religion, one had to ask whether the aid had resulted in governmental indoctrination and whether the aid defined its recipients by reference to religion.[174]

While Justice O'Connor substantially agreed with the plurality's evaluation of whether in applying Chapter 2 Jefferson Parish had defined its recipients by reference to religion,[175] she disagreed with how the plurality had interpreted the government indoctrination prong of the effect test. For Justice O'Connor, it was not just a question of whether the aid was neutrally distributed through private choice. Instead, Justice O'Connor used four factors, derived from *Agostini*, to evaluate whether Chapter 2 had led to indoctrination: (1) whether the aid was distributed on a neutral, secular basis; (2) whether the aid was used to supplement and not supplant school's core educational purpose; (3) whether the aid had reached the "coffers" of the religious school; and (4) whether the aid was secular, neutral and non-ideological.[176]

171. *Id.* at 828.
172. *See id.* at 828-29.
173. *See id.* at 844-45 (O'Connor, J., concurring). Because the respondents had not questioned whether the program had a secular purpose, Justice O'Connor, like the plurality, did not evaluate that aspect of the *Lemon* test as revised in *Agostini*. *See id.*
174. *See id.* at 845. Because the respondents had not questioned whether the program had created excessive entanglement, Justice O'Connor, like the plurality, did not evaluate that aspect of the *Lemon* test as revised in *Agostini*. *See id.*
175. *See id.* at 845-46.
176. *See id.* at 848-49.

Justice O'Connor concluded that Chapter 2 met each of these factors and that it, therefore, did not violate the Establishment Clause.[177] Her evaluation of the final factor dealt at length with her views on divertibility and diversion. Justice O'Connor agreed with the plurality that divertibility should have no place in Establishment Clause jurisprudence,[178] but contended that diversion has a role when the aid is given directly to the school.[179] So, for Justice O'Connor, when the government gives aid directly to the *student*, who then makes the choice to spend it on religious education, actual diversion is not a concern.[180] However, according to Justice O'Connor, when aid is given directly to a *school* through a neutral, per-capita-aid program, like Chapter 2, actual diversion violates the Establishment Clause.[181] To frame it in the words of O'Connor's test for government indoctrination (though not explicitly stated in the concurring opinion): when the aid is given directly to the student, the aid is inherently secular, neutral and non-ideological, but when aid, capable of diversion, is given directly to a school it is secular, neutral and non-ideological only until it is actually diverted.

Justice O'Connor listed three reasons she felt that diversion was a relevant inquiry for neutral, per-capita-aid programs that gave aid directly to the school. First, she felt that when the aid flowed through the student, as opposed to going directly to the school, the "decision to support religious education is made by the individual, not by the state."[182] Second, Justice O'Connor saw incidents of actual diversion of direct aid as communicating a message of government endorsement of religion.[183] Third, Justice O'Connor expressed concern that the plurality was charting a path that could eventually lead to the government providing direct monetary aid to religions and that because the plurality allowed diversion, the religions could use the direct monetary aid to support religious indoctrination.[184]

An incident of actual diversion by a private school is not necessarily a fatal blow under Justice O'Connor's analysis. As long as the violations are only "de minimis," the program, according to Justice O'Connor, remained constitutional.[185] Justice O'Connor did not set out a clear test for what constitutes a de minimis diversion as opposed to a diversion substantial enough to require a declaration that the en-

177. *See id.*
178. *See id.* at 849-60.
179. *See id.* at 837-38.
180. *See id.* at 840-43.
181. *See id.* at 840-44.
182. *Id.* at 842 (quoting Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 488 (1986)).
183. *See id.* at 842.
184. *See id.* at 843-44.
185. *See id.* at 864-67.

tire program is unconstitutional. However, she did find that the actual diversion that had occurred in Jefferson Parish only amounted to de minimis violations. The evidence in the *Mitchell* litigation of actual diversion consisted of testimony from a principal that a Chapter 2 computer at her school served as a backup to non-Chapter 2 computers,[186] as well as the evidence that some books with improper content had gone to private schools.[187] In Justice O'Connor's view, the Court had never "declared an entire aid program unconstitutional on Establishment Clause grounds solely because of violations on the miniscule scale of those at issue [in *Mitchell*]."[188] Thus, in Justice O'Connor's view, there was not a sufficient amount of actual diversion to invalidate the entire Chapter 2 aid program as applied.

III. ANALYSIS

The result in *Mitchell v. Helms* will surely provide encouragement for those who seek to provide government aid to private religious schools and, just as surely, it will leave those who advocate for a strict separation of church and state to complain, once more, that the wall has come tumbling down. The different methods in which the plurality and the concurrence handled the issues of diversion and divertibility will almost certainly add a spark to that debate. The plurality argued that neither divertibility nor diversion have a place in the case law. Justice O'Connor agreed that divertibility was not a proper Establishment Clause inquiry, but also believed that actual diversion was an important factor when the aid went directly to the school.

Because the debate over diversion and divertibility will almost certainly be a major factor in future school aid Establishment Clause cases, it is important to analyze the two positions and see whether the precedent or underlying Establishment Clause principles justify either position. Unfortunately, an analysis of precedent is not very helpful, as both positions can find justification in the past cases. The principles surrounding the Establishment Clause are more helpful and reveal that, while the plurality's position made sense, Justice O'Connor failed to adequately recognize the inherent dangers of government control over religious education that diversion, standing alone, poses.

186. *See id.* at 865.

187. *See id.* at 866. There was also evidence that a second grade class and a theology class might have used Chapter 2 aid. *See id.* at 864. Justice O'Connor argued that the evidence was not sufficient for the respondent to show they had met their burden of proof that actual diversion had occurred. *See id.*

188. *Id.* at 865.

A. Analysis of Precedent

The precedent does not clearly support either the plurality's view of diversion and divertibility or that of the concurrence. The first step of the analysis is to see what grounding, if any, diversion and divertibility have ever had in the case law. Both the plurality and the concurrence in *Mitchell* argued that divertibility lacked a solid precedential basis.[189] The plurality also argued that diversion never had a grounding in the Court's precedents.[190] An analysis of the case law, however, suggests that at least, at one point in time, both diversion and divertibility were considerations that the Court took seriously when evaluating aid to private schools under the Establishment Clause.

The plurality's contention that diversion was never a major concern of the Court is clearly erroneous.[191] In *Board of Education v. Allen*,[192] the Court said the following: "[n]othing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion. No evidence has been offered about particular schools, particular courses, particular teachers, or particular books."[193] This language suggested, rather clearly, that had the complainant shown an actual diversion of the books to religious purposes, the aid program would not have passed constitutional muster. A similar concern for diversion existed throughout the 1970s and even appeared as late as 1988.[194] All of this suggests that diversion was a significant concern for the Supreme Court for at least twenty years.

Despite the contentions of the plurality and the concurrence that divertibility lacks sufficient precedential weight,[195] it does seem that

189. *See id.* at 820-21, 853-57.
190. *See id.* at 823-24 n.10.
191. The fact that the argument was made in a footnote may shed some light on how little faith the plurality had in it.
192. 392 U.S. 236 (1968).
193. *Id.* at 248.
194. *See* Bowen v. Kendrick, 487 U.S. 589, 621 (1988) (remanding the case so that the district court could determine whether aid had been used to fund specifically religious activities in an otherwise substantially secular setting); Roemer v. Bd. of Pub. Works of Maryland, 426 U.S. 736, 765 (1976) ("[W]hat is crucial to a nonentangling aid program is the ability of the State to identify and subsidize separate secular functions carried out at the school without on-the-site inspections being necessary to prevent *diversion* of the funds to sectarian purposes." (emphasis added)); Hunt v. McNair, 413 U.S. 734, 743 (1973) ("Aid normally may be thought to have the effect of advancing religion when . . . it funds a specifically religious activity in an otherwise substantially secular setting."); Bd. of Educ. v. Allen, 392 U.S. 236, 248-49 (1968) (refusing to strike down a program to loan textbooks to students without evidence the books were used for religion).
195. Justice O'Connor said as follows:

the Court expressed a concern about the divertible nature of aid at least throughout the 1970s. The references that the Court made to the divertible nature of aid in *Meek v. Pittenger* and *Wolman v. Walter* suggested that the concept entered into the Court's decisions to strike down aid programs in those cases.[196] The Court's decisions striking down direct money aid also suggested that divertibility was a concern. For example, in *Committee for Public Education and Religious Liberty v. Nyquist*,[197] the Court expressed a concern that schools given money for maintenance expenses would use the aid to further their religious purposes by providing repair to the religious aspects of the schools.[198]

The cases that most persuasively show that divertibility was, at least at one time, an important Establishment Clause concern are those in which the Court discussed the basic rules it used to determine the constitutionality of an aid program. For example, in *Roemer v. Board of Public Works*,[199] the Court stated that "[w]hat is crucial to a nonentangling aid program is the ability of the State to identify and subsidize separate secular functions carried out at the school without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes."[200] Likewise, *Roemer* made clear that aid to pervasively sectarian institutions was suspect unless it "could be counted on to be purely secular."[201] In *Aguilar v. Felton*,[202] the Court relied on *Roemer* in striking down a program that funded classes taught by public school teachers at private schools.[203] These cases

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> The only possible direct precedential support for such a rule is a single sentence from our *Wolman* decision. There, the Court described *Allen* as having been "premised on the view that the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses." (citation omitted). To the extent this simple description of *Allen* is even correct, it certainly does not constitute an actual holding that the Establishment Clause prohibits the government from lending any divertible aid to religious schools.

Mitchell, 530 U.S. at 853 (O'Connor, J., concurring) (quoting Wolman v. Walter, 433 U.S. 229, 251 n.18 (1977)).

The plurality traced divertibility to a footnote in *Meek v. Pittenger*, *see* 421 U.S. 349, 366 n.16 (1975), and dismissed it as being peripheral to the *Meek* Court's reasoning, *see Mitchell*, 530 U.S. at 822. For a discussion of the footnote, *see supra* note 57.

196. *See* Wolman v. Walter, 433 U.S. 229, 251 n.18 (1977); Meek v. Pittenger, 421 U.S. 349 (1975).
197. 413 U.S. 756 (1973).
198. *See id.* at 774-80 ("No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the religion-oriented institutions to impose such restrictions.").
199. 426 U.S. 736 (1976).
200. *Id.* at 765.
201. *Id.* at 749.
202. 473 U.S. 402 (1985).
203. *See id.* at 411.

suggest that the Court was concerned about the divertible nature of aid and discredits the argument that divertibility was never an important factor in Establishment Clause analysis.

The second and more difficult step in analyzing the precedent encompassing diversion and divertibility is to examine whether more recent precedent has undercut either one or both of the concepts. More recent cases, specifically *Mueller v. Allen*,[204] *Witters v. Washington Services for the Blind*,[205] and *Zobrest v. Catalina Foothills School District*,[206] all allowed aid that was not only divertible, but that was almost certain to be diverted. In *Zobrest*, the type of aid allowed, a sign language interpreter, was analogous to an overhead or movie projector. Clearly, the interpreter was going to transmit religious instruction just as a movie projector showing a film about Christ would convey a religious message. Likewise in *Witters*, the Court allowed government aid to go directly to a student who used the money to attend a religious school so that he could become a pastor. As the *Mitchell* plurality said, "[d]iversion was guaranteed."[207] *Mueller* allowed tax deductions for tuition and educational equipment, but the Court placed no restrictions on how the schools were to use the materials for which the deductions were given.

Mueller, *Witters* and *Zobrest* all suggest that diversion and divertibility are no longer proper inquiries when deciding the constitutionality of an aid program. However, each of these cases dealt with a program that gave aid to the individual directly, who in turn used it for religious education. Thus, they also lend support to the argument made by the concurrence in *Mitchell* that when aid is given directly to a school, diversion is a proper inquiry. The more recent precedent therefore tends to undercut diversion and divertibility, but it is not at all clear whether the cases have completely eradicated the concepts from the case law or just reduced their influence to those aid programs that give direct, neutral aid to religious schools.

B. Analysis of Principle

For two reasons, it is necessary to evaluate the way that the plurality and the concurrence in *Mitchell* handled diversion and divertibility in the light of underlying Establishment Clause principles. First, the precedent, as has been seen, does not lend overwhelming support to either the view of the plurality or that of the concurrence.

204. 463 U.S. 388 (1983). For a discussion of *Mueller*, see *supra* text accompanying notes 66-68.

205. 474 U.S. 481 (1986). For a discussion of *Witters*, see *supra* text accompanying notes 69-74.

206. 509 U.S. 1 (1992). For a discussion of *Zobrest*, see *supra* text accompanying notes 75-77.

207. *Mitchell*, 530 U.S. at 821.

Second, and more importantly, even if the precedents were clear, it is still necessary to determine if they are grounded in solid principle, as unprincipled reliance on precedent is a notoriously weak basis for an argument.

The first question, then, is what Establishment Clause principle or principles does a prohibition against diversion (that is, a prohibition on the use of government aid to further the religious instead of the secular mission of the school) seek to protect? Diversion's basis is that government aid is valid only to serve the secular, and not the religious purpose of the school.[208] Once the government aid is used to further a religious mission, the government has, some would contend, become a participant in indoctrinating the religious viewpoint.[209]

This risk of indoctrination raises two possible Establishment Clause principles that could justify diversion. The first is grounded in endorsement. Under this view, when the aid recipient diverts the aid and uses it to communicate a religious message, the government has effectively endorsed that message.[210] This is apparently Justice O'Connor's primary concern about aid distributed on a per capita basis.[211] In *Mitchell*, she said, "[b]ecause the religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as government support for the advancement of religion."[212]

The second underlying principle one can argue that diversion protects is the prevention of a violation of an individual's religious conscience by the government.[213] Once again the basis is that government aid is valid only to serve the secular, and not the religious purpose of the school. When the aid is used to support the religious mission of the school, those who were compelled to pay tax dollars to provide the aid are being forced to help indoctrinate a message with which they do not agree. To illustrate, suppose that a Catholic school is using a Chapter 2 overhead to project a picture of the Assumption of the Virgin Mary into heaven. The Baptist taxpayer is thus forced to provide funds to support the indoctrination of dogma to which she does not subscribe.

There are also two possible explanations as to what Establishment Clause principles divertibility protects. The two views correspond

208. *See id.* at 842-43 (O'Connor, J., concurring); *see also* Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 774 (1973); Bd. of Educ. v. Allen, 392 U.S. 236, 248 (1968).
209. *See Mitchell*, 530 U.S. at 842-43 (O'Connor, J., concurring).
210. *See id.*
211. *See id.*
212. *Id.* at 843.
213. *See generally Mitchell*, 530 U.S. at 870-71 (Souter, J., dissenting); Paul A. Freund, Comment, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1684-86 (1969).

with the way that the Court has viewed divertibility as both an effect prong concern (under the revised *Agostini* test, a government indoctrination concern under the effect prong) and as an entanglement concern (under the revised *Agostini* test, an entanglement concern under the effect prong). First, divertibility can be seen as simply a prophylactic measure designed to protect the very same principles that diversion protects. This justification corresponds to the effect prong concern. Under this view, diversion is seen as inevitable. Of course, if one assumes this, then one must admit that the principles underlying diversion will also inevitably be violated. Therefore, it becomes necessary to prevent any aid capable of diversion from reaching a private school. This seems to be the logic employed by the Court when it struck down programs in *Meek* and *Wolman*.[214] In each of those cases, the Court noted the pervasively sectarian nature of the aid recipient and found that the aid would inevitably benefit the religious mission of the schools.[215]

The second justification for divertibility corresponds to the entanglement concern and grows out of the manner in which diversion and the oversight necessary to prevent diversion alter and control the message of the private religious school.[216] A prohibition on diversion limits the use of aid to secular purposes only. This tends to secularize the religious school. To illustrate the problem, consider two examples. The first is a program identical to that in *Lemon v. Kurtzman*.[217] There the state agreed to supplement the salaries of parochial school teachers so long as the teacher agreed "not to teach a course in religion for so long as or during such time as he or she receive[d] any salary supplements."[218] Thus, the program effectively had a no-diversion clause that was analogous to a no-diversion requirement by the Supreme Court. As Professor Michael W. McConnell (who was not discussing diversion at the time) pointed out: "[T]he [*Lemon*] program would have effectively destroyed religious education. Few schools could have resisted an offer of subsidies for their teachers' salaries,

214. *See* Wolman v. Walter, 433 U.S. 229, 248-52 (1978); Meek v. Pittenger, 421 U.S. 349, 362-66 (1975).

215. *See Wolman*, 433 U.S. at 248-54; *Meek*, 421 U.S. at 365-66.

216. *See* Aguilar v. Felton, 473 U.S. 402, 413 (1985) ("In short, the religious school which has as a primary purpose the advancement and preservation of a particular religion must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought."); Lemon v. Kurtzman, 403 U.S. 602, 620 (1971) ("This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.").

217. 403 U.S. 602 (1971).

218. *Id.* at 608.

and the curriculum of the parochial schools would have become indistinguishable from that of the public schools."[219]

Next consider a teacher at a private school using a Chapter 2 overhead to teach mathematics. The overhead projects a picture on to the classroom wall. On the same wall, the Ten Commandments are listed. Five commandments in very large print are immediately on either side of the projection. It is clear that the overhead is being used to teach the secular subject of mathematics, but it can also be said that it is being used to draw attention to and thereby inculcate fundamental religious tenets. In order to avoid diversion, the government must condition the aid on the requirement that the school take down the Ten Commandments before using the overhead.

In both of the above examples, the school is forced to choose between receiving the aid and weakening the religious message it is trying to send. The result is similar to extortion. The government is essentially saying, "I'll give you your aid, if you just tone down your religious message." But when the aid is limited to non-divertible aid, the threat of extortion does not exist.

As discussed above, Justice O'Connor rejected divertibility, but accepted diversion. Viewed in the light of the principles upon which divertibility rests, her position is untenable. She attacks divertibility by attempting to show that it was based on an underlying assumption that should no longer be made: that all private schools would use aid in an impermissible way without intrusive monitoring.[220] This reasoning attacks the first argument used to defend divertibility, that all divertible aid should be prohibited because of the near certainty of diversion. On this point, Justice O'Connor is correct. This justification for divertibility was weak. It required the Court to assume, without evidence, that otherwise law-abiding citizens would seek to violate the Establishment Clause based solely on their religious preference. In essence, it created a presumption that the religious were guilty, before they even had a chance to be guilty.

The hump that Justice O'Connor's analysis cannot get over, however, is the second justification for divertibility: to ensure that by prohibiting actual diversion the government does not alter the school's religious message. Admittedly, Justice O'Connor's view alleviates, in part, the duty of the executive branch to ensure that no diversion has occurred.[221] Without the presumption that unregulated private

219. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 142-43 (1992).

220. *See Mitchell*, 530 U.S. at 857-58 (O'Connor, J., concurring) (arguing that *Agostini* stood for the board proposition that "[irrebuttable] presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause").

221. *See id.* at 861.

schools will divert aid, there is no reason for the executive to watch pervasively every move that the private school makes. But the mere presence of executive branch monitors was never the only entanglement problem. Under Justice O'Connor's view, the same extortion-like problems explored in the above examples remain. If they want the aid, but do not want to violate the constitution, the teacher in the *Lemon*-type program must still only teach secular classes and the school using the Chapter 2 overhead still must remove the Ten Commandments. In other words, they still must choose between the sanctity of their religious message and the government aid.

The plurality avoided the problems Justice O'Connor had with divertibility by simply rejecting diversion. If no constitutional violation occurs when a sectarian school diverts aid, obviously no constitutional problem can exist simply because the aid is merely capable of diversion. The key question then in analyzing the plurality's view of diversion and divertibility is whether it was justified in rejecting diversion. Because neither of the two arguments that have been used to justify diversion correctly assess those constitutional principles they claim diversion protects, the plurality properly rejected diversion.

As discussed, the first of the two arguments used to justify diversion was that when a religious school uses government aid to inculcate religion, the government has "effectively communicated a message of endorsement" and thus "the reasonable observer would naturally perceive the aid program as government support for the advancement of religion."[222] This was the theory advanced by Justice O'Connor in *Mitchell*. This justification would be true if the aid were given only to religion or only to one particular religion. Then the government would clearly be sending a message that it was endorsing either religion generally or one religion in particular.

However, upon closer review, it is impossible to tell how the government has endorsed a religious message when a private school receiving aid through a neutral and generally available program diverts that aid. Under such a program, the government has no part in crafting the message it is supposedly endorsing. It seems that if the government were trying to inculcate the youth with a particular message about religion, it would at least want a hand in formulating that message. It is also unclear why the reasonable observer would think that the government has endorsed the religious message of a school when the aid diverted by that school is generally available to all other schools, public and non-public, religious and non-religious, and all are free to divert the aid to inculcate the message they want, whether that is a secular, religious or areligious message. If the Baptist school has

222. *Id.* at 843. Justice O'Connor's theory of endorsement was first articulated in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1983) (O'Connor, J., concurring).

used a Chapter 2 overhead to convey to its students the falsity of the Assumption of Mary and if the Catholic School has used its Chapter 2 overhead to show the truth of the Assumption and if the public school has made no mention of the Assumption, it is impossible to tell which of these conflicting messages the government has endorsed.[223]

The second justification for diversion explained above was that when aid is diverted to religious uses it results in a violation of the taxpayer's conscience. There are two problems with this justification for diversion. First, it fails to explain why aid only violates the religious conscience of a taxpayer when the aid is used for religious purposes. When any aid is given to a school, that aid tends to help the school as a whole and thus makes it more attractive to parents and students. Compare, for example, the bus services in *Everson v. Board of Education*[224] with the Chapter 2 aid granted in *Mitchell*. The aid provided in Chapter 2 was undoubtedly useful to the school, but the aid given in *Everson* was probably even more beneficial to the school as it provided for the free transportation of the students to the religious school. Once there, of course, the students received religious instruction to the advancement of the religion.[225] Thus, it is impossible to see why the non-divertible *Everson* bus program would offend a non-believer's conscience any less then a program where actual diversion was allowed, as both work to enhance the religious message with which the taxpayer disagrees.

The second problem with the taxpayer conscience argument is that it focuses solely on the taxpayer, without considering how the modern education system affects the religious students and their parents. The taxpayer-conscience justification for the no-diversion rule grows largely out of the following language from Madison's *Memorial and Remonstrance*: "Who does not see that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"[226] Of course, the modern education system is very different from that in Madison's time. Now, the modern family is faced with a choice of either sending their child to a secular public school and forfeiting a religious education or going to a private school and forfeiting their entitlement to a free edu-

223. Compare this with a system that prohibits diversion. As discussed earlier, when a school is not allowed to divert aid the government is required to play an important role in formulating the message that school will send to its students. *See supra* text accompanying notes 217-21. Indeed, though obviously not an issue in *Mitchell*, it appears that a very good reason to strike down Chapter 2 would have been that it did contain a non-diversion clause.

224. 330 U.S. 1 (1947).

225. *See id.* at 23-24 (Jackson, J., dissenting).

226. *Memorial and Remonstrance*, Para. 3, *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 63-72 (1947).

cation for the child.[227] Of course for those who cannot afford a private education, there is really no choice. Yet, the public school is almost certain to offend the religious conscience of the student and the family. To illustrate, consider a Roman Catholic junior high school student who during the unit in his sex education class about birth control has the option of going into the hallway or listening to the presentation. The presentation conflicts bluntly with the student's religious conscience. Of course, he is given the option of leaving, but doing so sends a message not only to him, but also to his fellow classmates, that his religious beliefs render him a second-class member of the school.

One possible way to remedy this problem is to provide aid to lessen the financial burden on the student's family if they choose to send their child to a private school. In such a situation, the aid, when diverted, violates the taxpayer's conscience, but the government is justified in allowing this because it is attempting to protect the religious conscience of another one of its citizens from an even more immediate harm to his or her religious conscience. The government is advancing religion not to elevate one religion over the other but to "remove an impediment to religious practice" for one of its citizens.[228]

A requirement of no diversion, however, negates any such benefit. As has been illustrated, a prohibition on diversion requires the private school to become more secular. Thus, to take the above example, under an aid program that did not allow diversion, the student would not really receive the religious education he desired. This is true because the requirement of diversion weakens the religious character of the education. Instead of getting Catholicism, the student gets Catholicism-lite.

IV. CONCLUSION

One of the most critical aspects of *Mitchell* was the debate between the Justices over diversion and divertibility. As the debate over greater school choice begins to reach the courts, the judges in those cases would be wise to follow the lead of the plurality and reject diversion and divertibility. By itself diversion is dangerous to religious institutions because it threatens to immerse them in a sea of secularism negating the religious messages they are trying to send. The only proper justification for divertibility is to negate the dangers posed by diversion. However, because diversion does not adequately relate to

227. *See* McConnell, *supra* note 219, at 129.
228. *See* McConnell, *supra* note 219, at 129.

those Establishment Clause principles that it claims to protect, there is no reason for either to have a place in Establishment Clause Jurisprudence.

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